Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In re Applications of	)	MM Docket No. 88-577
	)	
LIBERTY PRODUCTIONS A LIMITED PARTNERSHIP	)	File No. BPH-870831MI
	)	
WILLSYR COMMUNICATIONS LIMITED PARTNERSHIP	)	File No. BPH-870831MJ
	)	
BILTMORE FOREST BROADCASTING FM, INC.	)	File No. BPH-870831MK
	)	
SKYLAND BROADCASTING COMPANY	)	File No. BPH-870831ML
	)	
ORION COMMUNICATIONS LIMITED	)	File No. BPH-870901ME
	)	
For a Construction Permit for a New FM Broadcast Station on Channel 243A at Biltmore Forest, North Carolina	)	

To: The Commission

ENFORCEMENT BUREAU'S COMMENTS ON BASIC QUALIFICATIONS ISSUES CONCERNING LIBERTY PRODUCTIONS, A LIMITED PARTNERSHIP

Respectfully submitted,
Brad Berry
Deputy Chief, Enforcement Bureau

Charles W. Kelley
Chief, Investigations and Hearings Division

James W. Shook
Attorney

Federal Communications Commission
445 12th Street, S.W., Room 3-A463
Washington, D.C. 20554
(202) 418-1420
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Summary

The Enforcement Bureau submits that the Commission should deny all of the motions to enlarge. The motions do not raise substantial and material questions of fact with respect to Liberty's basic qualifications, nor do they provide a basis for dismissing Liberty's application.

Liberty's amendment should be accepted. It provides the information sought by the Commission's rules, and none of the objections contains sufficient reasons for rejecting the amendment.

The site certification issue should be resolved in Liberty's favor. Viewing the evidence as a whole, it does not appear that Liberty's principal, Valerie Klemmer, lied when she certified that Liberty's site was available. While she apparently was mistaken, the evidence indicates that she had a good faith belief that the landowner, Vicki Utter, was willing to lease a portion of her property in the event Liberty received the permit.

Liberty should lose the bidding credit and pay the full amount of its bid at the time of final payment. Liberty obtained a loan from Cumulus, a licensee of hundreds of stations, prior to the auction, a fact that Liberty reported before the auction began. The Bureau finds without merit Liberty's contention that it should retain the credit because it entered into the loan agreement with Cumulus after the deadline for filing short-form applications.

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1. By Order, FCC 00I-01, released January 14, 2000, the Commission, by the Assistant General Counsel, Administrative Law Division, offered the Enforcement Bureau ("Bureau") [1] an opportunity to submit its views relative to issues concerning the winning bidder for the Biltmore Forest channel, Liberty Productions, A Limited Partnership ("Liberty"). In this regard, the Order observed that, in addition to a previously raised false certification issue against Liberty,

[1] By Order, 14 FCC Rcd 17924 (1999); 64 FR 60715 (November 8, 1999), the Commission created, *inter alia*, the Enforcement Bureau. One of the functions of the new Bureau is to serve as trial staff with regard to matters designated for hearing. *See* Section 0.111(b) of the Commission's Rules, 47 C.F.R. § 0.111(b). Consequently, the Enforcement Bureau has replaced the Mass Media Bureau as a party to this proceeding.

pleadings filed by some of the other applicants in this proceeding had raised additional questions about Liberty's qualifications as well as questions about the processing of auction applications generally. Given the Bureau's role as trial staff in adjudicatory proceedings, the Order determined it would be useful to have the Bureau's views on all matters bearing on Liberty's basic qualifications and the processing of its short-form application and subsequent auction-related filings. As explained herein, the Bureau believes that none of the requested issues should be added and that the false certification issue should be decided in Liberty's favor. However, the Bureau also believes that Liberty is not entitled to the new entrant bidding credit.

Background

2. In 1992, the Commission awarded the contested permit for Biltmore Forest to Orion Communications Limited ("Orion"). National Communications Industries, 7 FCC Rcd 1703, *recon. denied*, 7 FCC Rcd 7581 (1992), *further recon. denied sub nom.* Liberty Productions, A Limited Partnership, 8 FCC Rcd 4264 (1993) (subsequent history omitted). With respect to Liberty, the Commission affirmed without discussion the Review Board's determination[2] that Liberty did not have reasonable assurance of the availability of its transmitter site at the time it filed its construction permit application. The Commission did not address whether Liberty had falsely certified that its proposed site was available, which the presiding Administrative Law Judge had concluded was an independent basis for disqualifying Liberty.[3]

3. While the Commission's decision granting the permit to Orion was on appeal, the court of appeals invalidated a principal criterion used by the Commission in choosing Orion as

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[2] 6 FCC Rcd 1978 (Rev. Bd. 1992).

[3] 5 FCC Rcd 2862, 2866-67, 2879 (ALJ 1991). *See also*, Order, FCC 99I-23, released November 23, 1999, at ¶ 5.

the Biltmore Forest winner.[4] Consequently, the court directed the Commission to reconsider its grant to Orion.[5] In the meantime, the Commission opted to stay the adjudication of all comparative broadcast cases pending resolution of the questions raised by Bechtel.[6]

4. Following a period of interim operation of a Biltmore Forest station,[7] the Commission in 1998 adopted an auction process to award construction permits in mutually exclusive broadcast situations.[8] Among other things, the process adopted restricted participation in auctions involving mutually exclusive applications filed before July 1, 1997, only to those persons whose applications were already on file.[9] The auction process as further refined provided that certain participants could receive a "new entrant" bidding credit of 35 percent if the winning bidder (and all individuals or entities with an attributable interest in the winning bidder) had no attributable interest in any other media of mass communications.[10] On August 5, 1999, shortly before the auction at issue here, the Commission decided to deem attributable to the broadcast auction bidder claiming new entrant status interests held by those holding at least a 33 percent equity and/or debt interest in the bidder, even if such interest were non-voting.[11] The

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[4] *See* Bechtel v. FCC, 10 F.3d 875 (D.C. Cir. 1993) ("Bechtel").

[5] *See* Order, 1994 WL 116196 (D.C. Cir.)

[6] FCC Freezes Comparative Proceedings, 9 FCC Rcd 1055 (1994), *modified*, 9 FCC Rcd 6689 (1994), *further modified*, 10 FCC Rcd 12182 (1995).

[7] Orion Communications, Ltd., 10 FCC Rcd 13066 (1995), *recon. denied*, 11 FCC Rcd 19589 (1996), *rev'd*, 131 F.3d 176 (D.C. Cir. 1997).

[8] *See* Amendment of Parts 1, 73 and 74 – Competitive Bidding, 13 FCC Rcd 15920 (1998), *recon. granted in part, denied in part*, 14 FCC Rcd 8724 (1999).

[9] *See* Section 309(l) of the Communications Act of 1934, as amended, 47 U.S.C. § 309(l).

[10] Amendment of Part 73 – Bidding Credit, 14 FCC Rcd 12541 (1999).

[11] Id. at 12543.

new attribution definition appeared in Section 73.5008(c) of the rules[12] and became effective on August 19, 1999. In pertinent part, however, the definition provides that mass media interests would be attributed to the winning bidder for the purpose of determining eligibility for the new entrant bidding credit, "if the equity (including all stockholdings, whether voting or nonvoting, common or preferred) and debt interest or interests, in the aggregate, [of the person or entity in question] exceed thirty-three (33) percent of the total asset value (defined as the aggregate of all equity plus all debt) of the winning bidder."

5. Meanwhile, in connection with the auction for Biltmore Forest, the Commission and staff issued a number of orders and public notices. First, by Order[13] released May 12, 1999, the Office of General Counsel identified the five captioned applicants as the only qualified bidders for the Biltmore Forest construction permit. Among other things, the Order advised that if Liberty were the auction winner, the hearing process, which had been frozen since 1994 (*see* note 6, *supra*, and related text), would be resumed to resolve the false site certification issue.

6. On July 9, 1999, the Mass Media Bureau and Wireless Telecommunications Bureau issued a public notice,[14] which announced the procedures and minimum opening bids for the Biltmore Forest auction. The public notice established September 28, 1999, as the opening date for the auction and August 20, 1999, as the deadline for filing the short-form application (FCC Form 175) used by those applicants that intended to participate in the auction. The public notice also set September 13, 1999, as the date by which applicants had to make upfront payments. The public notice advised that those wishing to participate in the auction had to "[c]omply with all

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[12] 47 C.F.R. § 73.5008(c). *See* Amendment of Part 73 – Bidding Credit, *supra* note 10, 14 FCC Rcd at 12553.

[13] 14 FCC Rcd 7637.

[14] Public Notice, DA 99-1346.

provisions outlined in this Public Notice and applicable rules of the Commission."[15] The upfront payment for the Biltmore Forest applicants was set at $130,000.[16]

7. One of the subjects discussed in the July 9, 1999, public notice was the new entrant bidding credit. The public notice stated that the bidder's attributable interests would be determined as of the short-form filing deadline, August 20. The public notice advised bidders that, in order to avoid attribution, those intending to divest a mass media interest or make an ownership change must have consummated the transaction or completed the change no later than August 20. The public notice further reminded bidders that the Commission was then considering whether to attribute the mass media interests of those with significant equity or debt interests, even if those interests were non-voting. Bidders were advised to take the foregoing into account when considering their qualifications for the new entrant bidding credit and that eligibility standards would be governed by the rule in effect on the day their short-form application was due. Finally, the public notice informed bidders seeking a new entrant bidding credit that they must submit a certification attesting to their eligibility with their short-form application.[17]

8. The July 9, 1999, public notice also set forth in Attachment B "Guidelines" for completion of the short-form application and accompanying exhibits. With respect to the new entrant bidding credit, the public notice advised: "[T]his is the sole opportunity applicants have

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[15] Id. at 4.

[16] Id. at Attachment A, p. 11.

[17] Id. at pp. 8-10. Applicants were also advised that they could make only minor non-technical corrections to their short form applications once the filing deadline had passed. One of the changes applicants would not be permitted to make was to "change bidding credits." Id. at 13. Permissible minor changes included revision of exhibits. Applicants were reminded that they had a continuing obligation to maintain the completeness and accuracy of information in their short form applications. Id. at 45.

to select New Entrant status and bidding credit level (if applicable), and there is no opportunity to change the election once the short-form filing deadline passes."[18] With respect to exhibits and attachments, the public notice stated that for "Exhibit A – Applicant Identity and Ownership Information," all applicants had to provide the following information: "*Also, bidders or attributable interest holders in bidders must certify under penalty of perjury that the bidder complies with the Commission's policies relating to media interests of immediate family members. See* Policy Statement, *Clarification of the Commission's Policies Regarding Spousal Attribution*, 7 FCC Rcd 1920 (1992)." (emphasis in the original)[19]

9. On August 10, 1999, the Mass Media Bureau/Wireless Telecommunications Bureau issued another public notice[20] advising applicants to pay close attention to the ownership disclosure requirements set forth in Sections 1.2105 and 1.2112 of the Commission's Rules.[21] In addition, the public notice informed applicants that the Commission had recently adopted specific attribution rules devised for broadcast auctions for the purpose of determining eligibility for the new entrant bidding credit. As discussed above, the new attribution rules became effective on August 19.

10. On August 20, 1999, Liberty and the other four Biltmore Forest applicants filed their short-form applications.[22] In its application, Liberty certified that it was a new entrant and

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[18] Id., Attachment B, p. 1.

[19] Id., Attachment B, p. 4. *See also*, id. at 10: "Bidders must certify (in Exhibit A) compliance with the Commission's policies relating to media interests of immediate family members."

[20] Public Notice, DA 99-1585.

[21] 47 C.F.R. §§ 1.2105, 1.2112.

[22] Although it filed a short-form application, Skyland Broadcasting Company ("Skyland") did not qualify as a bidder. *See* Public Notice, DA 99-1912 (September 17, 1999), Attachment C, p. 3.

entitled to a 35 percent bidding credit.[23] Liberty's Exhibit A verified that it had two partners, Valerie Klemmer ("Klemmer"),[24] the general partner, and David T. Murray ("Murray"), the limited partner. The exhibit also reported that Klemmer held a 35 percent equity interest and that Murray held a 65 percent equity interest. Liberty certified that its limited partner, Murray, would not be materially involved in the management or operation of the partnership. The exhibit did not contain a certification from its general partner, Klemmer, regarding compliance with the Commission's policies relating to mass media interests of immediate family members. In Exhibit C, Liberty certified under penalty of perjury that: "neither it nor any of its attributable interest holders have any attributable interest in any other media of mass communications as defined in 47 CFR 73.5008." On September 3, 1999, the staff determined that Liberty's short-form application was acceptable for filing.[25]

11. On September 10, 1999, Liberty entered into a loan agreement with Cumulus Broadcasting, Inc. ("Cumulus"). On September 27, 1999, Liberty filed an amended Exhibit E to its short-form application. Liberty reported the loan agreement and acknowledged that the loan proceeds would exceed 33 percent of Liberty's total asset value. Liberty further acknowledged that Cumulus had attributable media interests in more than three media outlets. Nonetheless, Liberty contended that Cumulus' interests were not attributable to Liberty because Liberty "had

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[23] All of the other Biltmore Forest applicants also claimed that they were entitled to the 35 percent bidding credit.

[24] She has since become Valerie Klemmer Watts. For ease of reference, the Bureau will continue to refer to her as Klemmer.

[25] Public Notice, DA 99-1800, Attachment A, p. 12. With respect to the auction scheduled for September 28, the Public Notice related that 202 applications had been accepted for filing, 99 were found incomplete, and 37 were rejected. Those that were deemed incomplete were given until September 14 to provide requested information or correct deficiencies. The rejected applications either were found not to be mutually exclusive with any other application or had a settlement agreement pending.

no agreement with Cumulus" as of August 20, the deadline for filing the short-form application. Liberty did not address the impact of the staff's September 17, 1999, public notice on its eligibility for the new entrant bidding credit. That public notice stated in pertinent part:

> Bidders are reminded that if ownership changes result in the diminishment or loss of a New Entrant Bidding Credit due to the attributable interests of new attributable interest holders, such information must be clearly stated in the bidder's amendment material and in the summary letter referenced above. In such cases, the Commission will make appropriate adjustments in the New Entrant Bidding Credit prior to the computation of down and final payment amounts due from any affected winning bidders.[26]

12. The auction commenced September 28, as scheduled, and Liberty won the Biltmore Forest auction with a high bid of $2,336,000 for the permit.[27] After computing its discount, Liberty's net bid was $1,518,400. On October 12, 1998, the staff announced the closing of the auction, listed the winners, and informed winning bidders of the due dates for their down payments and long-form application amendments.[28] Liberty made the required down payment and filed amendments to its Form 301 on November 10, 1999. Therein, Liberty continued to claim a new entrant bidding credit, and it explained in Exhibit C of its November 10 amendment why it believed neither Murray's interest nor Cumulus' interests should be attributed to Liberty.

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[26] Public Notice, DA 99-1912, p. 6. The public notice also directed applicants to send the referenced summary letters to two named individuals in the Wireless Telecommunications Bureau. There is no indication that Liberty did so.

[27] The losing applicants' last bids (without regard to the bidding credit each claimed) were: Willsyr Communications Limited Partnership ("Willsyr"), September 30, $568,000; Biltmore Forest Broadcasting FM, Inc. ("BFBFM"), October 7, $2,124,000; and Orion, October 1, $990,000. As noted above, Skyland did not participate in the auction.

[28] Public Notice, DA 99-2153. *See also*, Public Notice, DA 99-2355 (October 28, 1999) and Order, FCC 99I-23, released November 23, 1999.

Discussion

A. Motions to enlarge

13. A motion to enlarge the issues must be based on specific allegations of fact which, except for those subject to official notice, are supported by affidavits from persons with personal knowledge of the facts alleged. Folkways Broadcasting Co., 33 FCC 2d 806, 811 (Rev. Bd. 1972); Section 1.229(d) of the rules.[29] Those allegations must raise a substantial and material question of fact. *See* Armando Garcia, 3 FCC Rcd 1065 (Rev. Bd. 1988). Because the various motions raise no such questions, they should be denied.

14. False certifications. Willsyr, BFBFM and Orion contend that Liberty falsely certified its eligibility for a new entrant bidding credit. BFBFM and Orion observe that Liberty's limited partner, Murray, holds a 65 percent equity interest in Liberty and that Murray and his wife hold the permit for WRZK(FM) (formerly, WLJQ(FM)), Colonial Heights, Tennessee. They argue that, given Murray's mass media interest, Liberty could not reasonably have determined that Murray's interest was not attributable to Liberty. Willsyr and BFBFM also contend that Liberty's certification was disingenuous in light of its pre-auction agreement with Cumulus, which is acknowledged to hold hundreds of broadcast licenses.

15. To raise a substantial question of deceit, the moving party must not only show that the questionable representation was inaccurate or materially incomplete; it must also show intent to deceive. *See* Fox River Broadcasting, Inc., 93 FCC 2d 127, 129 (1983). Of course, under various scenarios, intent can be inferred. *E.g.*, Trinity Broadcasting of Florida, Inc., 14 FCC Rcd 13570, 13610 (1999), *appeal pending*. However, when it appears that an erroneous statement

[29] 47 C.F.R. § 1.229(d).

resulted from a mistaken interpretation of a statute or rule, the Commission has found no intent to deceive. *See* High Country Communications, 4 FCC Rcd 6237, 6238 (1989).

16. Prior to the filing of the Orion and BFBFM motions to enlarge, Liberty explained the basis of its certification with respect to Murray. In responding to the motions to enlarge, Liberty amplified on that explanation by providing a declaration from its general partner, Klemmer. Her declaration reflects that Murray's total investment in Liberty, that is, his equity and debt, was less than 33 percent of Liberty's "total asset value (defined as the aggregate of all equity plus all debt)." Orion and BFBFM have submitted no evidence refuting that claim. Accordingly, no substantial and material question of fact has been raised with respect to Liberty's certification regarding Murray.[30]

17. Liberty also informed the Commission prior to the auction that it had reached a loan agreement with Cumulus. Liberty further informed the Commission that the proceeds of the Cumulus loan "will exceed" 33 percent of Liberty's "total asset value." Finally, Liberty explained both in its September 27, 1999, amendment to its short-form application and in its November 10, 1999, amendment to its long-form application why it believed that Cumulus' mass media interests should not be attributed to Liberty. As noted, Liberty's explanation focused on the fact that its agreement with Cumulus was reached after the August 20, 1999, short-form filing deadline. Thus, both before and after the auction, Liberty divulged sufficient facts to allow a determination whether or not it was entitled to the new entrant bidding credit insofar as that credit related to its loan agreement with Cumulus. While the Bureau believes that Liberty's legal

[30] Although the Commission arguably meant to attribute the mass media interests of any individual or entity who holds a significant equity and/or debt interest in the applicant (*see* 14 FCC Rcd at 12543, ¶ 5), the rule is not so framed. Rather, the rule asks the applicant to perform a calculation to determine whether the equity and debt interests of the individual or entity in question exceed 33 percent of the total of the equity and the debt of the bidder. The record reflects that Liberty performed the required calculation.

conclusion – that it continued to be entitled to the bidding credit – was wrong (*see* Bidding Credit section, *infra*), the moving parties have produced no evidence (and the Bureau is aware of none) which shows that any of the factual assertions made in Liberty's amendments are false. Accordingly, addition of a false certification issue with respect to the Cumulus loan is unwarranted.

18. Absence of certification. BFBFM raises the question whether the absence of a certification that spouses or immediate family members of those holding attributable interests in the bidder warrants dismissal of the application. The answer is no. Section 1.2105(a)(2) of the rules[31] prescribes that broadcast applicants' short-form applications must contain ten categories of information, including a variety of certifications. However, the rules do not require expressly the submission of a spouse/family certification. Rather, Section 73.5002(b) provides that: "[A]ll applicants must timely submit short-form applications (FCC Form 175), along with all required certifications, information and exhibits, pursuant to the provisions of 47 CFR 1.2105(a) and any Commission public notices." As noted above, the staff's July 9, 1999, public notice required all applicants to submit a certification regarding compliance with the Commission's policies relating to media interests of immediate family members. Nevertheless, the practice of the Mass Media Bureau was to require such a certification from a potential bidder only when it appeared that immediate family members actually had media interests that could be attributable to the bidder. Otherwise, the Mass Media Bureau did not require or request submission of such a certification. Moreover, in subsequent auctions, the related public notices did not require submission of such a

[31] 47 C.F.R. § 1.2105(a)(2).

certification.[32] Accordingly, Liberty's failure to have filed a family attribution certification prior to the auction does not warrant dismissal of its application or addition of an issue.

19. Alleged misrepresentation of ownership structure. Willsyr's December 13, 1999, motion to enlarge, focuses on representations appearing in Liberty's November 26 and 29, 1999, pleadings which, in turn, addressed the BFBFM and Orion motions to enlarge. Willsyr notes that, according to Liberty, its limited partner, Murray, has paid less than $36,000 into the partnership. Willsyr further notes that, again according to Liberty, its general partner, Klemmer, has not communicated with Murray since 1990. Willsyr finds the foregoing "curious" in light of Liberty's post-1990 litigation in this proceeding, its involvement in the interim operation of the Biltmore Forest station, and its auction activities. Willsyr concludes either that Murray abandoned the partnership or that he was ousted for non-payment of contributions. In light of the foregoing, Willsyr seeks an issue to determine whether Liberty misrepresented that Murray holds a 65 percent equity interest as a limited partner.

20. As noted above, misrepresentation involves both a false statement and intent to deceive. Intent may be found from the false statement of fact, coupled with proof that the party making it had knowledge of its falsity. *See* David Ortiz Radio Corp. v. FCC, 941 F.2d 1253, 1260 (D.C. Cir. 1991). Intent may also be inferred from motive. *See* Joseph Barr, 10 FCC Rcd 32, 33 (Rev. Bd. 1994). Initially, the Bureau notes that Willsyr has alleged no facts that call into question whether Murray is still a limited partner of Liberty. In this regard, Willsyr has not submitted an affidavit from Murray (or from anyone else) indicating that Murray has withdrawn from Liberty or has doubts about his status. Moreover, Willsyr has not pointed to anything in

[32] *E.g.*, Public Notice, DA 99-2585 (November 19, 1999).

Liberty's limited partnership agreement suggesting that Klemmer's activities on Liberty's behalf have adversely affected the percentage of Murray's equity interest. In short, Willsyr is simply speculating that Murray's status and/or the percentage of his interest has been altered. Second, Willsyr has not demonstrated that Liberty had any intent to deceive. In this regard, Willsyr has not alleged any motive (and the Bureau can discern none) for Liberty to misrepresent Murray's status. Accordingly, Willsyr's motion to enlarge should be denied.

B. Liberty's Amendment

21. Liberty's November 10, 1999, amendment to its long-form application generated oppositions from Willsyr and Orion. Willsyr based its opposition on the fact that the Commission had previously determined that Liberty never had reasonable assurance of the availability of its originally specified site. Therefore, according to Willsyr, Liberty could never demonstrate "good cause" to amend to a new site. In addition to echoing Willsyr's argument, Orion contends that Liberty's amendment is unacceptable because Liberty has continued to claim a new entrant bidding credit despite its loan agreement with Cumulus; a loan agreement that Orion claims Liberty has never filed.

22. Section 73.3522(a)(2) of the rules[33] governs the filing of amendments to long-form applications. Nothing therein authorizes oppositions such as those filed by Willsyr and Orion. In this regard, the staff's October 28, 1999, public notice[34] specifically advised that there would be no opportunity to file petitions to deny and that petitions to enlarge would be governed by 47 C.F.R. § 1.229. Inasmuch as the Willsyr and Orion oppositions do not comply with 47 C.F.R. § 1.229 and are not otherwise authorized, they should be dismissed. However, should those

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[33] 47 C.F.R. §73.3522(a)(2). *See also*, Section 73.5005 of the rules, 47 C.F.R. § 73.5005.

[34] Public Notice, DA 99-2355.

pleadings be considered as motions to strike under Section 1.291 of the rules,[35] they should still be denied. In this regard, the Commission has repeatedly stated that site availability is an issue only to the extent that a certification may be questionable.[36] Thus, failure to establish reasonable assurance of the availability of the original site, standing alone, is no basis for rejecting a subsequent amendment. Likewise, the improper claim of a bidding credit is no basis for striking the amendment. As discussed, *infra*, if Liberty improperly claimed the credit, the Commission can disregard the credit and require full payment of Liberty's final bid. Finally, Orion has made no showing that Liberty is under an obligation to file at the Commission its loan agreement with Cumulus. Hence, Liberty's failure to file can not support Orion's request.

C. Site Certification Issue

23. Pursuant to a November 23, 1999, Order[37] from the Office of General Counsel, Liberty was given an opportunity to file a supplemental pleading which addressed the site certification issue. The Order further allowed oppositions and a reply from Liberty. After reviewing the supplemental pleading, the oppositions and the replies as well as the testimony of Klemmer, Timothy Warner ("Warner"), and Brian Lee ("Lee"), the Bureau believes that Klemmer did not commit a disqualifying misrepresentation when she, on Liberty's behalf, certified the availability of Liberty's originally specified transmitter site. In this regard, the Bureau notes that the Initial Decision does not contain any specific credibility findings relative to Klemmer or Warner and that the site owner, Ms. Vicki Utter ("Utter"), did not appear in person at the hearing. The Bureau is further aware that there is a direct conflict between the testimony

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[35] 47 C.F.R. § 1.291.

[36] Amendment of Parts 1, 73 and 74 – Competitive Bidding, 13 FCC Rcd at 15956, 15988. *See also*, Order, FCC 99I-23, *supra* note 3, at ¶ 6.

[37] FCC 99I-23, *supra* note 3, at ¶ 6.

of Klemmer and Warner, and various statements and deposition testimony from Utter. Our analysis follows.

24. On or about August 24, 1987, Klemmer telephoned Utter, who owned land outside of Biltmore Forest on Busbee Mountain. (Tr. 651, 670-72, 831, 851) Klemmer had received Utter's name from Warner, Klemmer's next-door neighbor, who worked for a local non-commercial station. (Tr. 651-52, 849, 933) Warner had previously learned that Utter's property was desirable as tower site. (Tr. 841) Klemmer informed Utter that she was a friend of Warner and that she intended to apply for a new FM station at Biltmore Forest and that she was interested in possibly leasing land from Utter to use as a transmitter site. (Tr. 652) Utter knew Warner because he had obtained permission from Utter to cross her property to perform work at a broadcast tower located on an adjacent property. (Tr. 835, 845-47) Utter scheduled a meeting for the following day. (Tr. 652, 670-72, 851)

25. The next day, Warner and Klemmer met Utter at her house. (Tr. 653-56) Warner introduced Klemmer and thereafter did most of the talking. (Tr. 653-56, 673-76, 871) They informed Utter of Klemmer's interest in applying for the new FM station. They also informed Utter of Klemmer's desire to locate her tower on Utter's land. They discussed where the tower would be placed, namely, between Utter's dog pen and an existing television tower, which had been erected on Utter's property approximately six months earlier; however, they did not settle upon an exact location. (Tr. 662-63, 678) They also discussed a price. Utter wanted $4,000 a year, even though she was receiving only $1,500 a year for the television tower. (Tr. 656, 673-78, 809-10, 877-78, 945, 961-62) Because they viewed Utter's property as the best possible location for Liberty's proposed tower, Warner and Klemmer decided Utter's request was not unreasonable. (Tr. 657, 879) They did not agree on a specific number of years for any lease that

might result. (Tr. 890) Klemmer and Warner understood, however, that Utter did not require any money at that time and that no lease would be prepared or executed unless Klemmer acquired the permit. (Tr. 665-67, 682-83, 889) Warner acknowledged, however, that neither he nor Klemmer made it clear to Utter that Klemmer was going to use Utter's name on Klemmer's application. (Tr. 966) The meeting lasted less than 30 minutes. (Tr. 683-84, 903) Klemmer did not look at other possible sites. (Tr. 676)

26. After leaving Utter, Klemmer and Warner discussed whether Klemmer had a sufficient basis for certifying the availability of Utter's property as Klemmer's transmitter site. In light of Warner's experience in acquiring sites for broadcast towers, Warner's relationship with Utter, and the existence of the tower on Utter's property, they believed Utter's oral commitment was sufficient. (Tr. 659-60, 809-10, 825-27, 845-47, 900, 962) Nevertheless, Warner cautioned that Klemmer should relate the situation to her attorney to obtain his opinion on whether she had obtained reasonable assurance. (Tr. 906) Warner thereafter plotted the location of Klemmer's tower and supplied the coordinates to Klemmer to give to her engineer. (Tr. 662-65, 687-89, 958-59) The coordinates chosen by Warner appeared in Liberty's application as the site for her proposed tower. (Tr. 664-65, 787-90)

27. Four days earlier, Utter had signed a lease with Brian Lee ("Lee"), an Orion principal. (Orion Ex. 4) The idea for the lease originated with Lee; Utter did not insist upon a lease. (Tr. 2465-69, 2473) Orion's local attorney prepared the lease. (Tr. 2461) The lease provided for an annual rent of $1,500, increasing to $4,000 upon commencement of construction. (Orion Ex. 4; Tr. 945, 2463) The lease specified a 20 feet by 50 feet section to be located north of the dog pen, the exact location to be selected by the lessee. (Orion Ex. 4; Tr. 946) Lee paid Utter $1,500 concurrent with the lease's execution. (Tr. 2473)

28. According to Warner, the dog pen is between 30 and 60 feet from the existing television tower on Utter's property. (Tr. 946) Warner acknowledged that the Lee lease could cover the same property Klemmer specified; however, the Lee(Orion)/Utter lease did not absolutely preclude Klemmer from using the location she specified in Liberty's application. (Tr. 947, 979) The Lee(Orion)/Utter lease was for a three-year term, renewable for two additional terms of three years at the option of the lessee. (Orion Ex. 4; Tr. 948) The coordinates specified in Orion's application differed by one second of latitude from those specified in Liberty's application. (Official notice requested; Tr. 978)

29. Klemmer and Warner both testified repeatedly that Utter did not tell them about her lease with Lee. (Tr. 659, 676-78, 915, 941, 978) Klemmer and Warner first became aware of the Lee(Orion)/Utter lease in 1989, in connection with Orion's motion to enlarge issues. (Tr. 659, 914-15) As an exhibit thereto, an Utter statement reflected she had never met Klemmer or anyone associated with Liberty in August 1987. (Liberty Ex. 6) In March 1989, Klemmer and Warner sought an explanation from Utter. (Tr. 908, 911) Utter indicated that she had forgotten about their August 1987 meeting. (Tr. 910-11) According to Warner, Utter did not deny that she had agreed to lease the site to Klemmer if Klemmer received the permit. (Tr. 912) Utter further related that, because Klemmer never contacted her thereafter, Utter assumed that Klemmer was no longer interested in leasing property from her. (Tr. 667-68) Klemmer unsuccessfully attempted to get Utter to sign a statement that Klemmer had prepared, which, *inter alia*, would have committed Utter to making a portion of her property available to Liberty. (Tr. 916) Although Utter signed a statement shortly thereafter which acknowledged that she had met Klemmer and Warner, she refused to make any portion of her land available to Liberty. (Liberty Ex. 7) Lee related that Utter told him in 1989 that she had met briefly with Klemmer and

Warner to talk about a tower site. According to Lee, Utter told Klemmer and Warner about the Lee(Orion)/Utter lease; however, Lee also testified that Utter further related that she would be happy to enter into a lease with them if they wanted a different piece of land. (Tr. 2499-2500)

30. The issue is whether Klemmer lied when she certified the availability of Utter's property on Liberty's construction permit application, not whether there had been a meeting of the minds relative to Klemmer's future use of Utter's property. As noted, the Initial Decision concluded that Klemmer had lied. National Communications Industries, *supra* note 3 at 2867, ¶ 49. That conclusion, in turn, appears to be based largely on Utter's deposition testimony, Liberty Ex. 13, and the existence of the Lee(Orion)/Utter lease. According to the Initial Decision, Utter's testimony reflects, *inter alia*, that: Klemmer did not call Utter in advance but simply arrived unannounced at Utter's property; Utter never discussed the possibility of leasing land to Klemmer; and Utter told them about the Lee(Orion)/Utter lease, of which Warner acknowledged his awareness. Id. at ¶¶ 40, 42-46. Notwithstanding the conclusion that Utter never discussed leasing land to Klemmer, the Initial Decision theorized that when Klemmer found out she was going to have to pay to lease land, she opted not to do so. Id. at ¶ 50. In the Bureau's view, this conclusion does not make sense in light of the amount of time and money Liberty has since expended in prosecuting its application.

31. The weight of the evidence reflects that Klemmer's certification, while imprudent, was not deceptive. First, the evidence indicates that a discussion, albeit inconclusive, occurred between Warner and Klemmer, on the one hand, and Utter. Those discussions may have touched upon, but probably did not focus on the Lee(Orion)/Utter lease. In this regard, because the lease was not Utter's idea, there is no reason to conclude she would have insisted upon Klemmer entering into a similar lease. Rather, understanding that only one party could ultimately prevail

in an upcoming comparative contest, Utter probably conveyed to Warner and Klemmer that she would willingly enter into a lease after the Commission awarded the permit. The price for such a lease was $4,000 per year, one that Warner advised Klemmer was reasonable considering all of the factors that made Utter's property an ideal choice for a tower site. As for the particular parcel chosen by Warner for Klemmer and Liberty, the evidence does not establish that the Lee(Orion)/Utter lease's coordinates either dictated or influenced Warner's choice of coordinates. In this regard, the plots specified by the competing applicants (Liberty and Orion) differ enough that the Lee(Orion)/Utter lease did not preclude Liberty from using the location specified in its application. Indeed, only one such tower would be built. Had Liberty prevailed, there is nothing in the record to suggest that Orion would have constructed a tower on Utter's land simply to foreclose construction by Liberty.

32. In addition to the foregoing, the Bureau notes that the Initial Decision makes no credibility findings relative to Klemmer or Warner. Instead, the Initial Decision essentially rejects Klemmer's testimony and ignores Warner's testimony.[38] Equally troubling, the Initial Decision fully credits Utter's "testimony," notwithstanding its inconsistencies -- specifically, her initial failure to recall meeting Klemmer (and Warner) and her insistence that a lease was never discussed with them with her admission to Lee that the possibility of a lease with Klemmer and Warner had indeed been discussed -- and despite the fact that she chose not to attend the hearing even though she had received a subpoena.

33. Thus, unlike cases such as Opal Chadwell, 2 FCC Rcd 5502, 5504 (Rev. Bd. 1987) (subsequent history omitted), the Bureau is not asking the Commission to overturn specific credibility findings because here, there are none. Rather, the Bureau believes that the

[38] By way of comparison, the Initial Decision fully credits Klemmer's testimony with respect to Liberty's ownership structure. Id. at 2871-72, ¶¶ 113-18.

Commission should review the record as a whole on the site certification issue and conclude that Klemmer did not misrepresent Liberty's site certification.

D. Bidding Credit

34. To date, Liberty has maintained that it is entitled to a new entrant bidding credit. With respect to the Cumulus loan, Liberty bases its claim on the fact that the loan agreement was not entered into until after August 20, 1999, the date short-form applications were due. Liberty is mistaken. On September 17, the staff advised: "Bidders are reminded that if ownership changes result in the diminishment or loss of a New Entrant bidding credit due to the attributable interests of new attributable interest holders, such information must be clearly stated in the bidder's amendment material...."[39] It thus appears that while an applicant could not acquire a new entrant bidding credit after it filed its short-form application, it could lose it. In this regard, although the September 17 public notice refers only to changes in a bidder's ownership, the Commission's attribution order[40] (and the new rule provision, 47 C.F.R. § 73.5008(c)) includes owners *and lenders* as entities whose mass media interests would affect a bidder's new entrant bidding credit. Accordingly, because Cumulus, which holds the licenses to more than three mass media interests, acquired attributable interests in Liberty within the meaning of 47 C.F.R. § 73.5008(c) before the auction, Liberty should lose its new entrant bidding credit. In accordance with the September 17 public notice, the Commission should make "appropriate adjustments" in

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[39] Public Notice, DA 99-1912 at p. 6, *supra* at ¶ 11 and n. 26.

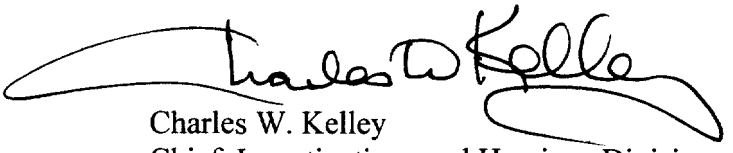
[40] Amendment of Part 73 – Bidding Credit, *supra* note 10.

the credit prior to the computation of the final down payment.[41]

Conclusion

35. Accordingly, the Bureau opposes addition of the requested issues, opposes dismissal of Liberty's application, and supports resolution of the false certification issue in Liberty's favor. However, the Bureau also believes that Liberty is not entitled to the new entrant bidding credit and should be required to pay the full amount of its bid at the time of final payment.

Respectfully submitted,
Brad Berry
Deputy Chief, Enforcement Bureau



Charles W. Kelley
Chief, Investigations and Hearings Division

James W. Shook
Attorney

Federal Communications Commission
445 12th Street, S.W., Room 3-A463
Washington, D.C. 20554
(202) 418-1430

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[41] Id. *See also*, Amendment of Parts 1, 73 and 74 – Competitive Bidding, *supra* note 8, 13 FCC Rcd at 15998 (¶ 195), where the Commission determined that an applicant that used the new entrant bidding credit should not be penalized with the loss of the credit for acquiring broadcast facilities during the five-year reimbursement period. However, the Commission did not address whether the credit would be affected if the applicant with the new entrant bidding credit acquired broadcast facilities between the date the short-form application was filed and the date of final payment for the frequency acquired with the credit.

CERTIFICATE OF SERVICE

Karen Richardson, secretary of the Enforcement Bureau's Investigations and Hearings Division, certifies that she has on this 14th day of February, 2000, sent by first class United States mail (or by hand) copies of the foregoing "Enforcement Bureau's Comments on Basic Qualifications Issues Concerning Liberty Productions, A Limited Partnership" to:

Timothy K. Brady, Esq.
P.O. Box 71309
Newnan, Georgia 30271-1309

Stephen T. Yelverton, Esq.
601 13th Street, N.W., Suite 500 North
Washington, D.C. 20005

Donald J. Evans, Esq.
Donelan, Cleary, Wood & Maser, P.C.
1100 New York Avenue, N.W., Suite 750
Washington, D.C. 20005

Robert A. DePont, Esq.
140 South Street
P.O. Box 386
Annapolis, Maryland 21404

Lee J. Peltzman, Esq.
Shainis & Peltzman, Chartered
1901 L Street, N.W., Suite 290
Washington, D.C. 20036

Karen Richardson